83-1469

No.



IN THE

# Supreme Court of the United States

October Term, 1983

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BEN SCHWARTZ,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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## PETITION FOR CERTIORARI

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IRVING ANOLIK
*Attorney for Petitioner*
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New York, NY 10007
(212) 732-3050

## Questions Presented.

1. Whether the State courts should have suppressed a search warrant when it became evident that the sole prosecution witness, a police officer, had intentionally and recklessly given false information to a Magistrate in order to obtain that warrant? (*Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 [1978].)

2. Whether there was probable cause to issue a search warrant, in view of the fact that the officer whose affidavit was used to obtain the warrant had given false information and was unable to state the particular premises to be searched or the items to be seized?

## Parties.

The parties in the Court below and in this Court are the same, namely Ben Schwartz and The People Of The State of New York.

## Table of Contents.

**Index to Appendix.**



TABLE OF AUTHORITIES.

Page

IN THE

**SUPREME COURT OF THE UNITED STATES**

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No._____

BEN SCHWARTZ,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

## PETITION FOR CERTIORARI.

### Opinion Below.

A copy of the opinions of the Courts below appears in the appendix to this brief.

**Jurisdiction.**

The petitioner was convicted of the crime of criminal possession of stolen property in the second degree under Section 165.44, subdivision 1 of the New York Penal Law. He was sentenced to 1-1/2 to 3 years imprisonment as a predicate felony offender. He is presently over 71 years of age.

The prosecution rested substantially upon a search warrant during which a seizure was made. The case was tried and proceeded to the Appellate Division and to the New York Court of Appeals, where it was remanded for an evidentiary hearing on the question of perjury for false statements by the sole police officer who supported the application for a search warrant. An evidentiary hearing was held before Honorable Hortense Gabel, a Justice of the Supreme Court, New York County, who denied the motion to suppress despite the fact that there was palpable falsity in the statements by the officer who applied for the search warrant.

The order of the Appellate Division, First Department, was rendered on October 18, 1983, affirming a judgment of the Supreme Court, New York County, rendered the 4th day of May, 1979. On the 13th day of December, 1983, Honorable Matthew J. Jasen, Associate Judge of the Court of Appeals, issued a certificate denying leave to appeal, a copy of which is annexed hereto and made a part hereof.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254 and 1257.

**Constitutional and Statutory Provisions Involved.**

The Fourth Amendment of the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

**Statement of the Case—Introductory.**

Since the issue presented to this Court is limited to the Fourth Amendment question as to whether the State Courts should have suppressed a search warrant because of false statements deliberately and/or recklessly articulated by the sole officer involved, we shall limit our discussion of the facts accordingly.

**The Evidence Relevant to this Petition.**

On December 7, 1977, petitioner was arrested for receiving stolen property, in a loft at 39th Street in the Borough of Manhattan, City and State of New York.

Following his arrest, a search warrant was applied for and obtained, as a result of which a thorough search of the aforesaid loft was conducted and a large amount of allegedly stolen property was recovered.

The petitioner was subsequently charged with criminal possession of stolen property in the first degree (three

counts); second degree (one count); and, third degree (one count).*

The petitioner brought on a motion to controvert and quash the search warrant by alleging that certain facts adduced by the officer's affidavit in support of the warrant were palpably false and perjurious.

Justice Irving Lang, then sitting in the Supreme Court, New York County, was assigned to hear the motion, but he held that the affidavit in support of the motion to controvert was insufficient to warrant a hearing and, accordingly, a hearing was not conducted.

Subsequently, the petitioner pleaded guilty to the crime of criminal possession of stolen property in the second degree, namely the Fourth Count of the indictment, in full satisfaction of the entire true bill. Under New York Law, of course, the right to appeal was nevertheless preserved.

Ben Schwartz, the petitioner herein, was sentenced to an indeterminate term of 1-1/2 to 3 years imprisonment, but has been granted a stay of that judgment ever since and, at the present time, as of the writing of this petition, he is still at liberty.

On March 6, 1980, the Appellate Division of the Supreme Court, First Department, affirmed the petitioner's conviction without opinion.

A leave to appeal to the Court of Appeals, however, was granted, and that Court modified the order of the Appellate Division, holding that it was error for the Trial

*The Indictment Number in the Supreme Court, New York County, was 5399/77.

Court to have denied a hearing on petitioner's motion to controvert the search warrant, and it was remitted for such a hearing.

That hearing was held on the 21st of December, 1981, before Justice Hortense Gabel of the Supreme Court, New York County, who upheld the validity of the search warrant. This is despite the fact that there was palpably false information given by the sole officer who submitted an affidavit in support of that warrant.

The police officer who submitted an affidavit was Officer Dominick Ragusa.

The thrust of Ragusa's affidavit was to the effect that the petitioner was conducting a "fencing" operation at a particular premises.

It is not denied that Police Officer Ragusa gave false information in his affidavit in support of the warrant.

Among the allegations that were set forth in the police officer's affidavit in support of the warrant was that:

> (a) "That on December 7, 1977 at approximately 4:30 P.M. I personally observed Anthony Zehler remove one carton containing merchandise from a handtruck being pushed on the street by a delivery person and run away with said carton."
>
> (b) "That I followed said individual to 270 W. 39th St., Fifth Floor, Room No. 1 and I saw said individual enter said premises with said merchandise" (A61).

At the trial, however, and the hearing, the officer frankly admitted that he "did not actually see Mr. Zehler physically walk into Room No. 1 on the Fifth Floor." Secondly, he admitted that he did not actually see Mr. Zehler physically leave Room No. 1. Furthermore, he admitted that he had lost sight of Mr. Zehler when he went around the corner of a particular corridor (A70, A80).*

At the conclusion of the hearing, the Court below ruled that the two questionable paragraphs were "inaccurate" (A97). The Court further ruled, however, that the discrepancies that were committed in the "press for the warrant" were not "prejudicial to the defendant" (A98).

The Court conducting the hearing, in its decision, stated, *inter alia*, as follows (A97-A98):

> "The Court: In this case I have to tell you that I think there are some differences in the warrant and none of them are essential elements that would contravene any basic statement that the officer made in applying for the warrant and the warrant itself.
>
> "I believe that these are errors that could have been made in the press of an application for this. The error in no way prejudiced the defendant and I therefore sustain the warrant.
>
> "Mr. Panzer: Respectfully object."

---

*Numerals in parentheses preceded by the prefix "A" refer to pages of the appendix used in the Court below.

## Reasons For Granting The Writ.

### I.

**The hearing court below found that false information was in fact given by the officer who submitted an affidavit to the magistrate in support of an application for a search warrant. Under those circumstances, the motion to controvert the warrant should have been granted. The false information referred to essential aspects of the warrant and, in essence, revealed that the court officer in fact did not know specifically which premises were to be searched and what items were to be seized.**

Even before the case of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (noted in 45 Brook.L.Rev. 391), it had been recognized that among the grounds developed for suppressing or quashing a search warrant was that the affidavit in support thereof contained untruthful statements of fact (see *United States v. Bolton*, C.A.9th, 1972, 458 F.2d 377, 378; *United States v. Upshaw*, C.A.5th, 1971, 448 F.2d1218, 1221, cert. den. 405 U.S. 936, 92 S.Ct. 970; *United States v. Roth*, C.A.7th, 1967, 391 F.2d 507; *United States v, Gillette*, C.A.2d, 1967, 383 F.2d 843, 848-849; *King v. United States*, C.A.4th, 1960, 282 F.2d 398, 399-400; *United States ex. rel. Petillo v. New Jersey*, D.C.N.J. 1975, 400 F. Supp. 1152, 1179, vacated C.A.3d, 1976, 541 F.2d 275; *United States v. La Berge*, D.C.Md 1967, 267 F.Supp. 686, 692 n. 5; *People v. Alfinito*, 16 N.Y.2d 181, 264 N.Y.S.2d 243, 17 Syracuse L. Rev. 564; American Law Institute, "Model Code of Pre-Arraignment Procedure, Proposed Official Draft 1975", §§SS290.3[1]; and so forth).

In 1978, in *Franks v. Delaware*, *supra*, the Supreme Court of the United States affirmed that this is a basis for suppressing evidence, though the holding is carefully worded. The thrust of the opinion is that when there is falsity intentionally or recklessly injected in an affidavit in support of a warrant, suppression of the evidence seized is mandated.

We need not tarry over the question of whether a hearing was required, since a hearing was mandated and granted in the case at bar. The Hearing Justice concluded that the statements to which we have referred *supra*, were in fact false and constituted misrepresentations.

It will be noted that the falsity of the statements involved involve the essential ingredients of the warrant itself because, had the officer told the truth, it would have become obvious that he did not in fact see which premises Mr. Zehler entered, nor what items were in fact in that particular premises.

In other words, the officer could not say for certain, or with any degree of certainty, that the premises of Ben Schwartz were those involved and, consequently, his false statements misinformed the Magistrate, and a warrant was issued under circumstances where had the truth been known, there would have been insufficient specificity required to satisfy the Fourth Amendment requirements.

Nor are there good faith reasons for overlooking what was said. There was no evidence that the officer involved here acted in good faith. Nor were his misstatements merely innocent or negligent.

It is obvious that they were intentional and deliberate. To say that they were uttered in the "press" to obtain a search warrant is no answer. The Fourth Amendment is very exacting and requires specificity as well as clear probable cause.

We submit that the statements of the affiant were material in the sense that without the false or reckless misstatements, the affidavit would not have been sufficient to support a finding of probable cause (*Franks v. Delaware, supra,* 438 U.S. at 171, 172, 98 S.Ct. at 2684-2685. See too, Comment, "Challenging the Veracity of a Facially Sufficient Search Warrant Affidavit: The Truth is Relevant," 1979, 24 S.D.L.Rev. 126, 136-138).

While there may be dissatisfaction with the exclusionary rule in certain quarters, so long as it remains the law, there can be no doubt that courts must suppress any evidence obtained in violation of the Fourth Amendment (*Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081).

For example, it is still understood that a search warrant must also be suppressed if the officers violated the federal statute requiring them to knock and give notice of their purpose before entering to make a search (18 U.S.C.A. §3109; *Miller v. United States,* 357 U.S. 301, 2 L.Ed.2d 1332 [1958]; *United States v. Burke,* C.A.2d, 1975, 517 F.2d 377, 386, n. 13).

As a further example, it has also been held that unrecorded sworn testimony of the affiant before the Magistrate cannot be considered in determining probable cause and consequently if the affidavit is either false or insufficient, evidence must be suppressed (*United States v. Hittle,* C.A. 10th, 1978, 575 F.2d 799).

Similarly, it has been held that suppression is also mandated, despite the fact that the Magistrate relied upon his own knowledge of the informant and his experience with the informant in another case to cure the defects in an affidavit (*United States v. Acosta*, C.A. 5th, 1974, 501 F.2d 1330, cert. den. 423 U.S. 891, 46 L.Ed.2d 122).

We submit that in the case at bar the error was not merely *de minimis*, but was substantial.

In *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), this Court held that no good faith exception has been recognized to date by this Court.

In any event, we maintain that a good faith exception cannot even be considered in the case at bar, because there is no excuse of good faith. The officer obviously misled the Court, and did so recklessly and/or deliberately.

Furthermore, it is undisputed that a search cannot be justified by what it produces (*Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441; *Johnson v. United States*, 333 U.S. 10, 92 L.Ed.2d 436; *Sibron v. New York*, 392 U.S. 40, 20 L.Ed.2d 917).

In fact, this Court has held that a search is either good or bad when it starts (*Ker v. California*, 374 U.S. 23, 10 L.Ed.2d 726).

I.

**In view of the false information given by the affiant herein, the search warrant was void because it was not founded upon probable cause. Without the false statements, there was no specificity as to the place to be searched or the items to be seized.**

Officer Ragusa admitted that he gave false information in support of the search warrant. In his affidavit he conceded that he did not actually see Mr. Zehler enter a particular premises, nor could he determine what was in those premises. In fact, he was not even sure they were the premises of the petitioner, Mr. Schwartz (see *Stanford v. Texas*, 379 U.S. 476, 13 L.Ed.2d 431; *Berger v. New York*, 388 U.S. 41, 18 L.Ed.2d 1040. See also, *LO-JI sales, Inc., v. New York*, 442 U.S. 319, 60 L.Ed.2d 920).

Furthermore, it has been held that probable cause for the issuance of a search warrant necessarily implies not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person, each of which can be unmistakably identified so as to be capable of being particularly described in the search warrant from the information in the affidavit (see *Lowery v. United States*, C.C.A. 8th, 1947, 161 F.2d 30, cert. den. 331 U.S. 849, 91 L.Ed. 1858).

In view of the foregoing, we maintain that the warrant was defective on these grounds as well.

## CONCLUSION.

**The petition for certiorari should be granted.**

Respectfully submitted,

IRVING ANOLIK
A Member of the bar of this Court
Attorney for Petitioner

*Certification.*

I, IRVING ANOLIK, a member of the bar of this Court, certify that a copy of the within petition was duly served by First Class Mail on the 10th day of February, 1984, on the District Attorney, New York County, by depositing a true copy thereof in a depository of the United States Post Office, addressed to the District Attorney, New York County, One Hogan Place, New York, New York, 10013.

Dated: New York, New York
February 10, 1984.

IRVING ANOLIK

*Certification.*

I, IRVING ANOLIK, a member of the bar of this Court, certify that three copies of the within petition were duly served by First Class Mail on the 2nd day of March, 1984, on the District Attorney, New York County, by depositing three true copies thereof in a depository of the United States Post Office, addressed to the District Attorney, New York County, One Hogan Place, New York, New York, 10013.

Dated: New York, New York
March 2, 1984.

IRVING ANOLIK

**Order of Appellate Division Dated March 6, 1980.**

137

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 6, 1980.

Present:

Hon. Harold Birns
Justice Presiding
Arnold L. Fein
David Ross
Vincent A. Lupiano
Max Bloom
Justices

---

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

BEN SCHWARTZ,

*Defendant-Appellant.*

7616

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An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Sklar, J.), rendered on May 4, 1979, convicting defendant of criminal possession of stolen property in the second degree, and said appeal having been argued by Mr. Joseph Panzer of counsel for the appellant, and by Mr. Daniel J. Castleman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Enter:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

**Order of New York State Court of Appeals Dated May 19, 1980.**

COURT OF APPEALS

Before: Hon. Bernard S. Meyer, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

*against*

BEN SCHWARTZ,
*Defendant-Appellant.*

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Proceedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at New York, New York
May 19, 1980

BERNARD S. MEYER
Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered March 6, 1980, affirming judgment of the Supreme Court, New York County, rendered May 4, 1979, convicting defendant of criminal possession of stolen property in the second degree.

**Order and Opinion of the New York State Court of Appeals.**

MEMORANDA 1063

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 6, 1980, which affirmed a judgment of the Supreme Court (STANLEY L. SKLAR, J.), rendered in New York County, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the second degree. Defendant and two other men were arrested after police officers observed one of the men steal a carton from a hand truck and the officers followed him to a fifth floor room of a certain building where defendant was discovered. Several hours later, one of the officers returned to the room after obtaining a search warrant and discovered a large quantity of stolen merchandise. Defendant moved to controvert the search warrant on the grounds that probable cause did not exist to support its issuance and that it was illegally obtained, alleging that the police officers searched the premises and seized certain merchandise before obtaining the warrant. The court denied defendant's motion without a hearing. Defendant elected to go to trial but during the People's direct case, he entered a plea of guilty to criminal possession of stolen property in the second degree in satisfaction of the entire indictment. In the Court of Appeals, defendant argued that the court erred in not granting an evidentiary hearing on his motion to controvert the search warrant.

*People v. Schwartz*, 74 AD2d 753, modified.

## HEADNOTE

Crimes—Search Warrant

An order of the Appellate Division, which affirmed a judgment convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the second degree, is modified, and the matter remitted to Supreme Court to hold a hearing. On this record, it was error to refuse the application for a hearing on defendant's motion to controvert the search warrant, which he contended was illegally obtained and was issued without probable cause.

## APPEARANCES OF COUNSEL

Joseph Panzer for appellant.

Robert M. Morgenthau, District Attorney (Daniel J. Castleman and Vivian Berger of counsel), for respondent.



## OPINION OF THE COURT

MEMORANDUM

On the record here, it was error to refuse to grant the application for a hearing on defendant's motion to controvert the search warrant. Therefore the order of the Appellate Division should be modified and the matter remitted to Supreme Court, New York County, to hold a hearing and determine the motion anew. In the event defendant prevails, the plea should be vacated and appropriate further proceedings ensue. However, if it is the People who prevail, the judgment should be amended to reflect the additional proceedings that have taken place.

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER concur.

Order modified and case remitted to Supreme Court, New York County, for further proceedings in accordance with the memorandum herein and, as so modified, affirmed.

**Certificate Denying Leave to Appeal to the Court of Appeals.**

**COURT OF APPEALS,**

**STATE OF NEW YORK.**

**Before: Hon. Matthew J. Jasen, Associate Judge.**

THE PEOPLE OF THE STATE OF NEW YORK

*Respondent,*

*against*

BEN SCHWARTZ,

*Appellant.*

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
December 13, 1983.

MATTHEW J. JASEN
Associate Judge

**Affidavit of P. O. Dominick Ragusa.**

CRIMINAL COURT OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

State of New York
County of N.Y.

P. O. Dominick Ragusa 26789 Mts. Acu being duly sworn, deposes and says:

1. I am a police officer of the N. Y. City Police Dept.

2. I have information based upon my observation of the acts of one Anthony Zephier, of 1695 Nelson Ave. Bronx, N.Y. and subsequent conversations with said Anthony Zephier, that a fencing operation is being conducted by Benjamin Schwartz, at 270 W. 39 St., N.Y., 5th Floor, Room 1, and that stolen property is stored at the said premises in boxes, on racks, shelves, packages, storage areas, under counters, in desk drawers and behind counters.

a) that on December 7, '977, at approx. 4:30 P.M., I personally observed Anthony Zephier remove one carton containing merchandise from a hand truck being pushed on the street by a delivery person, and run away with said carton.

b) that I followed said individual to 270 W. 39 St., 5th Floor, Room No. 1 and saw said individual enter said premises with said merchandise.

c) that I waited near the elevator door on the 5th Floor and saw said individual leave Room No. 1 without the carton.

d) that I stopped said individual by the elevator, identified myself as a police officer and placed him under arrest for Petty Larceny PL 155.25 and Criminal Possession of stolen property, PL 165.45.

e) that I advised said individual of his Miranda rights and asked him what he did with the carton, and said individual replied that he delivered the carton to "Benny" in return for a sum of U.S. currency.

f) that I entered Room No. 1 and immediately observed the aforementioned carton, now empty, on the counter next to an individual who I later determined to be the said "Benny." (the defendant Benjamin Schwartz) and immediately next to the empty carton I observed the shipping label.

g) that I asked defendant "Where is Benny?" and defendant said "I don't know who he is."

h) that I identified myself as a police officer and asked defendant what his name was and he said "I'm Benny."

i) that I placed the defendant under arrest for CPSP 3rd and advised him of his Miranda rights.

j) that I entered the area behind the counter in said premises to determine whether any other persons were present inside said premises.

k) that, accompanied by the defendant, I observed a large quantity of packages, cartons, stored in the premises

and also stereos, coats, watches, ladies hand bags, sunglasses, belts, sweaters, various ladies and men's apparel with tags, cigaret lighters, dishes.

l) that I asked the defendant whether he had any receipts, bills of lading, invoices, etc. to prove ownership of the above described merchandise, and the defendant said he didn't have any.

m) that an individual, later identified as Percell Hopkins, walked into said Room No. 1 carrying a carton with the shipping label ripped off.

n) that this individual, Percell Hopkins, took flight upon entering in the room. I chased and apprehended said individual at which time he informed me that the packages he was carrying was found by him on the street.

o) that 5 minutes after the apprehension of said Hopkins a person known to me and the unit to which I am assigned * * * and rack and package thief, entered Room 1.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property specified above is stolen property and may be found in the possession of said Benjamin Schwartz or at premises 270 W. 39 St., 5th Floor, Room No. 1.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of premises at 270 W. 39 St. 5th Floor, Room 1, including boxes, racks, shelves, packages, desk drawers therein, and directing that if such property

or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

.....

Police Officer Shield Rank Command

Sworn to before me
Dec. 7, 1977

.....

Judge

**Search Warrant.**

CRIMINAL COURT OF THE CITY OF NEW YORK,

COUNTY OF N. Y.

In the name of the People of the State of New York:

To any police officer of the City of New York.

Proof by affidavit (or deposition) having been made this day before me by P.O. Dominick Ragusa MTS ACU that there is probable cause for believing that certain property to wit: packages, cartons, stored on the premises, also stereos, coats, watches, dresses, ladies handbags, sun glasses, belts, sweaters, various ladies and men's apparel with tags, cigaret lighters and dishes.

You are therefore commanded between 6:00 A.M. and 9:00 P.M. or to make an immediate search of 270 W. 39 St. 5th Floor Room No. 1 occupied by Benjamin Schwartz and if you find any such property or any part thereof to bring it before me at Part A 29 at 100 Centre Street, New York City.

Dated at New York City
Dec. 8, 1977

.....
Judge

**83 - 1469**

No.

IN THE

# Supreme Court of the United States

**October Term, 1983**

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BEN SCHWARTZ,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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## Supplemental Appendix to Petition for Certiorari

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IRVING ANOLIK
*Attorney for Petitioner*
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New York, NY 10007
(212) 732-3050

## Table of Contents.

**Order of Affirmance by the Supreme Court of the State of New York, Appellate Division, First Judicial Department.**

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 18, 1983.

Present:

Hon. Theodore R. Kupferman,
Justice Presiding,
Joseph P. Sullivan,
Samuel J. Silverman,
Max Bloom,
Fritz W. Alexander, II,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

BEN SCHWARTZ,

*Defendant-Appellant.*

17641

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Stanley Sklar, J.), rendered on May 4, 1979, convicting defendant of criminal possession of stolen property in the second degree, and said appeal having been argued by Joseph Panzer of counsel for the appellant, and by Daniel J. Castleman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI
Clerk.

No. 83-1469

IN THE

# Supreme Court of the United States

October Term, 1983

BEN SCHWARTZ,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NORMAN BARCLAY
ETHAN GREENBERG
Assistant District Attorneys
*Of Counsel*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

No. 83-1469

IN THE

# Supreme Court of the United States

October Term, 1983

BEN SCHWARTZ,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Preliminary Statement

On May 4, 1979 petitioner Ben Schwartz was convicted in the New York Supreme Court, New York County (Sklar, J.), upon his plea of guilty, of Criminal Possession of Stolen Property in the Second Degree (New York Penal Law §165.45). Schwartz was sentenced as a second felony offender to an indeterminate term of from one and one-half

to three years imprisonment. He was released on bail pending appeal and remains at liberty pursuant to a stay of the judgment of conviction against him. By an order dated March 6, 1980 the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 74 A.D.2d 753 (1st Dept. 1980). Petitioner then appealed to the New York Court of Appeals which remitted the matter to Supreme Court, New York County for a hearing on petitioner's motion to controvert a search warrant issued in the case. 52 N.Y.2d 1063 (1981). On December 21, 1981 a hearing was conducted before Justice Hortense Gabel and the warrant was upheld. By an order dated October 18, 1983 the Appellate Division, First Department, again unanimously affirmed the judgment without opinion. 97 A.D.2d 379 (1st Dept. 1983). On December 13, 1983 leave to appeal the Appellate Division's order to the New York Court of Appeals was denied (AP: 7A).*

## The Proceedings in the Court Below

### A. The Search Warrant

On December 7, 1977 petitioner was arrested for receiving stolen property in a loft on 39th Street in the borough of Manhattan in New York City. Shortly thereafter the arresting police officer, Dominick Ragusa, submitted an affidavit in support of an application for a warrant to search the loft.

* Citations will be abbreviated in the following manner: the Appendix to the Petition for Certiorari will be referred to as AP; the bound Record on Appeal submitted with petitioner's appeal to the New York Court of Appeals will be referred to as R; the minutes of the hearing on remand will be referred to as M.

Officer Ragusa's affidavit stated that at approximately 4:30 p.m. on December 7 he personally observed Anthony Zephier remove a carton from a handtruck and run away (AP: 8A). Ragusa followed Zephier to 270 West 39th Street, fifth floor, Room No. 1, and saw Zephier enter the premises with the carton (AP: 8A). Ragusa waited near the elevator on the fifth floor and saw Zephier leave Room No. 1 without the carton (AP: 9A). Officer Ragusa stopped Zephier, identified himself as a police officer, and placed Zephier under arrest for larceny and criminal possession of stolen property (AP: 9A). The officer advised Zephier of his rights and asked him what he had done with the carton. Zephier replied that he had sold it to "Benny" (AP: 9A). Ragusa entered Room No. 1 and saw the carton that Zephier had stolen, now empty, on a counter, next to a person later identified as the petitioner Benjamin Schwartz (AP: 9A).

Officer Ragusa asked Schwartz, "Where is Benny?" and Schwartz replied that he did not know who Benny was. Officer Ragusa identified himself as a police officer and asked Schwartz what his name was. Appellant replied that he was "Benny" (AP: 9A). Ragusa then arrested Schwartz and advised him of his rights (AP: 9A).

Officer Ragusa entered the area behind the counter in order to determine whether any other people were present. He observed a large number of items including stereos, coats, watches, dresses, handbags, sunglasses, belts, sweaters, various men's and women's apparel, cigarette lighters, and dishes (AP: 9A-10A). Ragusa asked petitioner whether he had any receipts, bills of lading, invoices, or other proof

of ownership for this merchandise; petitioner replied that he did not (AP: 10A).

A man later identified as Purcell Hopkins then walked into the room carrying a carton with the shipping label partially detached. When Hopkins saw Officer Ragusa he attempted to flee. Upon apprehension by the officer, Hopkins said that he had found the carton on the street (AP: 10A). About five minutes after Regusa apprehended Hopkins, another individual known to Ragusa and his unit within the police department as a "rack and package thief" entered Room No. 1 (AP: 10A).

Based upon all of this information, Officer Ragusa asserted probable cause to believe that the property in the loft was stolen and that a fencing operation was being conducted by Benjamin Schwartz at 270 West 39th Street, on the fifth floor, Room No. 1 (AP: 10A).

A search warrant was issued based on Officer Ragusa's sworn affidavit. The warrant authorized an immediate search and seizure of property in the premises occupied by Benjamin Schwartz at 270 West 39th Street, fifth floor, Room No. 1. The property to be seized was described as:

> packages, cartons, stored in the premises, also stereos, coats, watches, dresses, ladies handbags, sunglasses, belts, sweaters, various ladies and men's apparel with tags, cigarette lighters and dishes.

(AP: 12A). The warrant was executed. The property seized included: 236 pairs of sunglasses; 21 women's colored dresses; 11 women's colored blouse suits; 4 women's jackets; 10 women's pants suits; 8 pocketbooks; 765 Mickey Mouse watches; and a quantity of women's slacks (R: 24A-25A).

**B. Pre-Trial Proceedings**

Defendant was charged with three counts of Criminal Possession of Stolen Property in the First Degree (New York Penal Law §165.50), one count of Criminal Possession of Stolen Property in the Second Degree (New York Penal Law §165.45), and one count of Criminal Possession of Stolen Property in the Third Degree (New York Penal Law §165.40). New York County Indictment 5399/77.

Petitioner moved to controvert the search warrant. Justice Irving Lang denied the motion without a hearing when petitioner's counsel conceded that the officer had not lied in his affidavit. Petitioner retained new counsel who renewed the motion, alleging that certain statements made by Officer Ragusa in his affidavit were not true. Petitioner's affidavit in support of his motion averred that at no time did he buy or receive any stolen merchandise from anyone and that no one had removed any of the merchandise in the premises from a handtruck (R: 31A-32A). Petitioner further alleged that police officers entered his loft and searched it without a warrant; he contended that the warrant later obtained was a subterfuge because the property had actually been seized during the first, warrantless search (R: 31A-2A). Justice Lang again declined to hold a hearing, finding no essential contradiction between petitioner's affidavit and that of Officer Ragusa (R: 42A-47A).

**C. The Trial and Plea of Guilty**

Petitioner proceeded to trial on March 8, 1979 before Justice Stanley L. Sklar and a jury. The People presented two witnesses upon their direct case: **Leo Marzolla** and Officer **Dominick Ragusa.**

Marzolla testified that during December of 1977 he sublet Room No. 1 on the fifth floor of 270 West 39th Street to petitioner (R: 53A-56A). Officer Ragusa testified to the events of December 7, 1977, previously described in his affidavit in support of the search warrant application.

Officer Ragusa's testimony was substantially the same as the statements in his affidavit, with one difference. Ragusa again related how he followed Zephier, the carton thief, to the fifth floor at 270 West 39th Street (R: 5-6, 8, 25-7). He then frankly noted that he waited by the elevator when Zephier exited that elevator, and lost sight of Zephier as Zephier turned a corner down the corridor (R: 10, 28-9, 93). When Zephier returned to the elevator without the stolen cartons about three or four minutes later, Ragusa arrested and questioned him (R: 10-11, 13-14, 31). Ragusa next proceeded into Room No. 1 himself; he did not see any other rooms in the vicinity (R: 14, 100). Ragusa then recounted the same observations set forth in his affidavit concerning the presence of Zephier's stolen carton and petitioner in Room No. 1, the unexplained presence of a large amount of merchandise, petitioner's evasive responses to questions and the arrival, flight and apprehension of Purcell Hopkins with his "found" package.

On March 12, 1979, during the presentation of the People's case at trial, petitioner pleaded guilty to Criminal Possession of Stolen Property in the Second Degree in satisfaction of the entire indictment (R: 122). In the course of a full plea colloquy petitioner admitted that on December 7, 1977, he knowingly possessed stolen property valued in excess of $250.00 (R: 124). On May 4, 1979 petitioner was sentenced as noted above.

**D. The Remand and Hearing on the Motion to Controvert the Search Warrant**

Petitioner appealed his conviction, alleging (1) that there was no probable cause to support the issuance of the search warrant; (2) that the warrant was overbroad and therefore void; and (3) that the court below should have granted a hearing on his motion to controvert the warrant. On March 6, 1980 the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 74 A.D.2d 753 (1st Dept. 1980). The New York Court of Appeals granted leave to appeal (R: 136). The Court of Appeals modified the order of the Appellate Division, holding that it was error for the trial court to have denied a hearing on petitioner's motion to controvert the search warrant, and remitted the case for such a hearing. 52 N.Y.2d 1063 (1981).

On December 21, 1981, a hearing on defendant's motion to controvert the search warrant was conducted pursuant to the order of the Court of Appeals. Justice Hortense Gabel presided. Police Officer Ragusa again testified to the events of December 7, 1977. His testimony was essentially the same as his testimony at trial (M: 32-97). At the conclusion of the hearing Justice Gabel upheld the search warrant. Justice Gabel held that although there were some differences between the information in the officer's affidavit and his testimony at the hearing, the differences were not essential and did not invalidate the warrant (M: 97-8).

Petitioner again appealed. By an order dated October 18, 1983 the Appellate Division, First Department, unanimously affirmed the judgment of conviction without opinion.

97 A.D.2d 379 (1st Dept. 1983). On December 13, 1983 leave to appeal the order of the Appellate Division to the New York Court of Appeals was denied by Associate Judge Matthew J. Jasen (AP: 7A).

**E. The Instant Petition**

Petitioner now contends that Officer Ragusa's affidavit contained "palpably false information" and "misrepresentations" (Petition, pp. 5 and 8) without which the affidavit would have been: (1) insufficient to support a finding of probable cause; and (2) insufficiently specific as to the premises to be searched and items seized to satisfy the requirements of the Fourth Amendment.

## Reasons for Denying the Writ

Generally this Court will grant a petition for certiorari only where novel issues of national import or constitutional dimension are raised, or where there exists a split among the Federal appellate courts as to a particular issue. *See e.g. Davis* v. *Alaska,* 414 U.S. 308, 315 (1974); *Katzinger* v. *Chicago Metallic Mfg. Co.,* 329 U.S. 394 (1947). *See generally* Stern and Gressman, *Supreme Court Practice,* §4.27, pp. 315-17 (5th ed. 1978).

The claims raised by petitioner do not merit a grant of certiorari. Petitioner has attempted to formulate the question here in a fashion which implicates the rule of *Franks* v. *Delaware,* 438 U.S. 154 (1978) which holds that material misrepresentations in an affidavit for a search warrant will invalidate the warrant. Petitioner alleges that Officer Ragusa's affidavit contained deliberate falsehoods and that

consequently the hearing court should not have sustained the search warrant. Petitioner's claims do not raise novel or disputed questions of law; instead they call for the application of well settled law to an individual fact pattern with no ramifications beyond this case. Furthermore, petitioner's claims are simply untrue and involve a distortion of both the findings of the court below and the record upon which those findings were based.

Petitioner draws attention to an apparent discrepancy between Officer Ragusa's affidavit, on the one hand, and his testimony both at trial and at the hearing on the warrant, on the other. In his affidavit Officer Ragusa stated:

> a). that on December 7, 1977 at approximately 4:30 p.m., I personally observed Antony Zephier remove one carton containing merchandise from a hand truck being pushed on the street by a delivery person, and run away with said carton.
>
> b). that I followed said individual to 270 W. 39th St. 5th floor, Room No. 1 and saw said individual enter said premises with said merchandise.
>
> c). that I waited near the elevator door on the 5th Floor and saw said individual leave Room No. 1 without the carton.

(AP: 8A-9A). At trial and again at the hearing on the warrant Ragusa frankly testified that although he followed Zephier up the elevator to the fifth floor at 270 West 39th Street (R: 8-9, 26-7), when Zephier went around a corner down the corridor Ragusa briefly lost sight of him (R: 29, 93). Ragusa did not see Zephier enter or exit the door of Room No. 1; instead he next saw Zephier about three or four minutes later when Zephier returned to the elevator without the package (R: 10-11, 28, 31).

On this basis petitioner now urges that under the rule of *Franks* v. *Delaware* suppression of the evidence seized pursuant to the warrant was "mandated" (Petition, p. 8). *Franks* makes it clear that where a warrant affidavit contains a false statement, made either intentionally or with reckless disregard for the truth, and where the material that is the subject of the falsehood is necessary to a finding of probable cause, a defendant is entitled to suppression of evidence seized pursuant to the warrant.

Petitioner does not appear to take issue with this well settled principle or to challenge any statement of law made by the courts below. Instead petitioner appears to contend only that the hearing court found that Ragusa's affidavit contained "misrepresentations" (Petition p. 8). Petitioner does not appear to contend that the hearing court found that these misrepresentations were necessary to a finding of probable cause. Therefore petitioner's own argument seems to concede that the court did not misapply the rule of *Franks* which requires a showing of both falsehood *and* materiality.

If petitioner intends to imply that the court below erred in finding that the alleged falsehoods were not material, that contention is not a proper issue for this Court's review. It involves a simple finding of fact which is not a proper subject for review by this Court, and one peculiar to this case alone; it does not involve any broader issue of law.

Indeed, even if the court below had found that Ragusa's affidavit contained representations which were both deliberately false and material, the court's decision not to suppress the evidence seized would have constituted an isolated, simple error of law without broader import justifying certiorari.

In any event, the factual premises underlying defendant's argument are inaccurate, because petitioner has mischaracterized the findings of the court below. Petitioner asserts that the hearing justice "concluded" that the challenged statements "were in fact false and constituted misrepresentations" (Petition, p. 8). Petitioner is wrong. The hearing court instead concluded:

> I think there are some differences in the warrant and none of them are essential elements that would contravene any basic statement the officer made in applying for the warrant and the warrant itself.
>
> I believe that these are errors that could have been made in the press of an application for this. The error in no way prejudiced the defendant and I therefore sustain the warrant (M: 97-8).

Thus the court in substance concluded that there had been no violation of the *Franks* standard, since Ragusa's statements were neither intentionally or recklessly false and that in any event the challenged statements were not necessary to a finding of probable cause.

The hearing court's conclusion was correct. Officer Ragusa's affidavit at worst contained an ambiguity on a point not essential to a finding of probable cause. The affidavit states that Ragusa followed the thief to 270 West 39th Street, fifth floor, Room No. 1, and saw him enter the "premises" with the stolen carton. The term "premises" is imprecise; it may refer to the whole building, only to the fifth floor or only to Room No. 1 itself. The courts have recognized that semantic imperfections in warrant affidavits may arise because of the exigencies of hurried drafting by a

non-lawyer police officer while other officers wait to conduct a search. *See United States* v. *Ventresca*, 380 U.S. 102, 106 (1965).

Furthermore, this imprecision of language is without significance in the factual context of this case. Ragusa proceeded down the same hall through which Zephier had scurried minutes before with the stolen carton. Room No. 1 was the only room in the vicinity. Ragusa entered Room No. 1 and in short order observed both the stolen carton which Zephier had by his own admission just "fenced" with "Benny" and "Benny" himself—the petitioner Ben Schwartz. Although Ragusa did not see Zephier take the last few steps before entering Room No. 1 it was obvious from the unchallenged facts in Ragusa's affidavit that Zephier had just sold his stolen carton in Room No. 1 and that a fencing operation was being conducted within. The presence of Zephier's stolen box, the unexplained vast quantities of merchandise, Schwartz's evasive conduct, the arrival and flight of Hopkins with his carton, and the arrival of the known rack and package thief, all amply and independently supported Ragusa's assertion of probable cause.

Petitioner's contentions here involve a rather minor question of fact that was fairly resolved against him by the hearing court below which was affirmed without dissent. Indeed petitioner is only able to challenge these prior determinations by distorting the record below. His argument is without merit and its further consideration would not serve the purposes of certiorari.

## Conclusion

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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